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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

NO. 71-5078

DEAN RENE PETERS,

Petitioner,

v.

C. P. KIFF, WARDEN,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF OF RESPONDENT

ARTHUR K. BOLTON
Attorney General

HAROLD N. HILL, JR.
Executive Assistant
Attorney General

COURTNEY WILDER STANTON
Assistant Attorney General

DOROTHY T. BEASLEY
Assistant Attorney General

DAVID L. G. KING, JR.
Assistant Attorney General
Attorneys for Respondent

P. O. ADDRESS:

132 State Judicial Bldg.
40 Capitol Square, S.W.
Atlanta, Georgia 30334

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BRIEF FOR RESPONDENT

STATEMENT OF THE QUESTION

Is a member of the Caucasian race, who claims no identity with the Negro race and no discrimination resulting against him,

entitled in a habeas corpus proceeding to have an otherwise valid State conviction set aside on the basis that an alleged exclusion of members of the Negro race from the grand jury which indicted him, denied him equal protection of the laws?

[Neither part (b) of Petitioner's first question as presented in his Brief (page 4), nor his second question are involved in this review.]

SUMMARY OF ARGUMENT

When a black man is indicted by a jury from which members of the Negro race have been systematically excluded, he is placed in a position of inequality which is condemned by the equal protection clause of the Fourteenth Amendment. In such cases the law recognizes and presumes that race prejudice infects the determination of the grand jury and, therefore, finds that the defendant has not been afforded the impartial and fair consideration to which he is entitled. But the same inequality does not exist as to a white man indicted by the same body; in addition, the presumption of bias or partiality cannot be recognized under these same circumstances. A white man, such as Dean Rene Peters, must identify himself with the excluded class in order to employ the evidentiary benefits of the presumption of partiality.

Without this, he is not in an unequal position as to other defendants and is not denied equal protection of the law.

The question of retroactivity is not involved in this case. If a rule is framed in this case which would find a denial of equal protection to a white man when black men are excluded from grand jury service, then the present Petitioner would be given the benefit of the rule.

ARGUMENT

I.

THE ALLEGED EXCLUSION OF MEMBERS OF THE NEGRO RACE FROM THE GRAND JURY WHICH INDICTED A MEMBER OF THE CAUCASIAN RACE DOES NOT CONSTITUTE A DENIAL OF EQUAL PROTECTION OF THE LAWS TO THE WHITE DEFENDANT WITHOUT A SHOWING OF FACTS WHICH MIGHT OTHERWISE IDENTIFY HIM WITH THE EXCLUDED CLASS OR WHICH MIGHT SHOW DISCRIMINATION AGAINST HIM.

A. A white man is not treated unequally when Negroes are excluded from his grand jury; therefore, the first prerequisite to establishing an unconstitutional denial of equal protection of the laws is absent in this case.

Dean Rene Peters has appealed to this Court seeking a correction of the Fifth Circuit's determination that he, as a member of the Caucasian race and as an individual with no identifiable ties with the Negro community or to persons of the Negro race, was not denied equal protection of the laws as guaranteed under the Fourteenth Amendment to the United States Constitution when he was indicted by a jury from which Negroes had allegedly been intentionally excluded. (A. 20-21).

The court below ruled that equal protection was not denied. Due process considerations were not discussed in the court's opinion nor ruled on. Petitioner here makes no complaint about the decision of the court below in this regard and, therefore, cannot now newly inject due process arguments. The case on certiorari is limited to a review of the equal protection claim. Further, it is limited to a review only as it applies to the grand jury, which is the extent of the question as framed by Petitioner in his petition to this Court. Namet v. United States, 373 U.S. 179, 190 (1963); Rules of the Supreme Court, Rule 23(1)(c).

This Court has consistently, since the adoption of the Fourteenth Amendment, condemned the practice of intentional exclusion, on the basis of race, of any person otherwise qualified to serve as a juror, from such participation. Compare Strauder v. West Virginia, 100 U.S. 303 (1879), with Carter v. Greene County, 396 U.S. 320 (1970). In the administration of otherwise constitutional statutes controlling the selection of jurors, all citizens within the jurisdiction of a particular state are entitled to equal consideration and treatment in the actual application of those statutes. When this Court has considered equal protection challenges on the administration of a

state's jury selection system, the traditional proceeding in which the issue has arisen has been an individual defendant's challenge on a state criminal conviction. See Carter v. Greene County, supra at 329. There is, then, a wealth of precedent from which to examine and determine the necessary prerequisites in establishing that a given criminal conviction is constitutionally defective on the basis that the individual involved has been denied equal protection of the laws.

Concisely, when the Fourteenth Amendment prohibits any state from depriving any person within its jurisdiction of the equal protection of the laws, it commands that all persons, similarly situated, shall be treated in a like manner. Truax v. Corrigan, 257 U.S. 312, 328 (1921). The general purpose of this protection is to prevent "undue favor and individual or class privilege, on the one hand, and a hostile discrimination or the oppression of inequality, on the other." Truax v. Corrigan, supra, at 332-3. In the context of the particular type of unequal treatment alleged to have existed in Peters' original criminal proceeding, the equal protection clause is adapted to ensure that a black man not be indicted or tried by juries from which the latter's race has been intentionally excluded. Strauder v. West Virginia, 100 U.S. 303, 307 (1879).

To place a man on trial before and under a system from which members of his race have been intentionally excluded places him in an initial position of inequality which is condemned under the relevant constitutional protection:

> "It is well known that prejudices often exist against particular classes in a community, which sway the judgment of jurors, and which, therefore, operate in some cases to deny to persons of those classes the full enjoyment of that protection which others enjoy." Strauder v. West Virginia, 100 U.S. 303, 309 (1879) [emphasis added]

Charging a black man with the same crime as a white man is charged with, and subjecting him to the same penalty, takes on fatal denial of equal protection of the laws when members of the black man's own race are intentionally excluded from the charging and trying juries. Similarly situated white persons are simply treated more favorably in such situations, and it is this prejudicial disparity in treatment that cannot allow a black man's conviction to stand under the Constitution.

It does not follow, however, that a white man is denied equal protection of the

laws when members of the black race are allegedly excluded from the jury which determines the possible existence of probable cause to bring a man to trial. In this context, class membership is not a constitutional requirement which defeats an otherwise valid claim under the Fourteenth Amendment, see Fay v. New York, 332 U.S. 261, 287 (1946), but rather it is a requirement which keeps the equal protection claim from ever being established in the first place. If and when a particular exclusion of a given class from the jury system is determined to be impermissible under the Fourteenth Amendment, equal protection deprivations are established, but only as to the person against whom such intentional or unintentional discriminations are directed. See Hernandez v. Texas, 347 U.S. 475, 478 (1953).

The position taken by Petitioner Peters that he as well as any defendant indicted by juries from which Negroes have been intentionally excluded is entitled to have his conviction set aside is founded to a large degree on language extracted from the opinion of the Georgia Court of Appeals in Allen v. State, 110 Ga. App. 56, 62 (1964). In turn, the Allen opinion relies on language quoted from the dissenting opinion in Fay v. New York, 332 U.S. 261, 298 (1946):

> "The equal protection clause of the Fourteenth Amendment prohibits a state from convicting any person by use of a jury which is not impartially drawn from a cross-section of the community."

What the Allen court failed to either recognize or distinguish, is that the equal protection claim that the dissenting opinion in Fay v. New York, supra, argued had been established, was founded on the fact that Fay had been tried by a special jury while the majority of defendants in New York had been tried by general juries. In other words, Fay had a basis upon which to base a denial of equal protection because there existed, by operation of the laws in his state, two distinct classes of defendants; as the court pointed out:

> "But we are dealing here with a very subtle and sophisticated form of discrimination which does not lend itself to easy or precise proof. The proof here is adequate enough to demonstrate that this panel, like every discriminatorily selected 'blue ribbon' panel, suffers from a constitutional infirmity. That infirmity is the denial of equal protection

> to those who are tried by a jury drawn from a 'blue ribbon' panel. Such a panel is narrower and different from that used in forming other juries to try the vast majority of other accused persons. To the extent of that difference, therefore, the persons tried by 'blue ribbon' juries receive unequal protection." Fay v. New York, 332 U.S. 261, 299 (1946).

When claiming a denial of equal protection of the laws, the necessity of establishing a dual system in which the complaining party is a member of the class of individuals against whom the unlawful discrimination operates is very much an element of the claim.

B. Unless a person belongs to the excluded class, he must establish that the absence of the particular class from his grand jury somehow effected the impartiality of the grand jury determination.

The identity aspect of the constitutional denial asserted in this proceeding is one that is viable and necessary. Unlawful discriminations created by statutes or acts of state officials do not operate to injure those in whose favor those discriminations are made. See generally Salisbury v. Grimes, 406 F.2d 50, 51 (5th Cir. 1969) (holding that a showing of bias or prejudice is necessary to raise a question of constitutional dimensions, and stating specifically that there can be no racial prejudice between members of the same); Woodruff v. Breazeale, 291 F.Supp. 130, 132 (N.D. Miss. 1967), aff'd. 401 F.2d 997 (1968); United States v. Valentine, 288 F.Supp. 957 (D.P.R. 1968). In the traditional jury discrimination case brought and initiated by an individual who is a member of the unlawfully excluded class, the element of personal prejudice or harm in the equal protection cause of action is a requirement. However, in such a case the element is

simply presumed to exist as a matter of law. Strauder v. Virginia, 100 U.S. 303 309 (1879). This same presumption exists in the reasoning behind the provisions of 18 U.S.C. § 243, which declares it a crime for any persons to discriminate in the selection of jurors on the basis of race. But that same presumption simply does not exist when an individual not otherwise identified with the excluded class seeks to show a denial, as to him, of the equal protection of the laws. In his case, the judicially cognizable facts which support presumption are simply absent. A white man, asserting that the exclusion of black men on his grand jury denied him equal protection of the law must "comply with the exacting requirements of proving clearly that in his own case the procedure has gone so far afield that its results are a denial of equal protection or due process." Fay v. New York, supra at 284.

Compliance with this requirement is evidenced in the recent case of Bokulich v. Jury Commission of Green County, 298 F.Supp. 181 (N.D. Ala. 1968), aff'd. 394 U.S. 97 (1969).

Claiming that trial by a jury from which Negroes have been systematically excluded would prejudice him in his de-

fense and otherwise deny him equal protection of law, Bokulich established his identity with the excluded class by showing that although he was white, he was also a civil rights worker associated with the Southern Christian Leadership Conference. The Court properly noted that while the case in which the complaining party is of the same racial group as that alleged to be excluded is a clear instance of potential violation of equal protection, such a situation does not set the outer limits of the guarantee or the right to complain of the violation. Bokulich v. Jury Comm'n, supra, at 185 n. 2. This, of course, was the situation in Allen v. State, 110 Ga. App. 56, 62 (1964). 1/ See also

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1/ There appears to be only one decision favoring a party claiming constitutional deprivations on the basis of a class exclusion from the jury selection process who was not actually identified with the group. State v. Madison, 213 A.2d 880 (Md. 1965). Upon review of the identical question by a federal court, the reasoning of the State court on the federal question was rejected. Smith v. Brough 248 F.Supp. 435, 440-2 (D.C. Md. 1965), aff'd. 362 F.2d 763 (4th Cir. 1966).

Rabinowitz v. United States, 366 F.2d 34, 37 (5th Cir. 1966) ("standing" was not raised as an issue, however, since the official shortcoming found in the case was based specifically on the failure to properly implement federal statutes -- "We do not legislate for Congress; we do effectuate that policy which Congress through its legislation has directed us to implement.")

The requirement of prejudice or class identity to establish the equal protection claim should be maintained as an integral part of any person's case, particularly in a post-conviction proceeding where the issue was not raised at the original trial and the state did not have the opportunity to cure the error, if any:

> "The question whether there was a violation of a defendant's rights under the Fourteenth Amendment should turn on whether the facts and circumstances show some prejudice or likelihood of prejudice as a result of the exclusion. If the facts and circumstances show merely a bare possibility of prejudice, or no prejudice at all, it is doubtful whether a deprivation

> of due process or equal protection of the laws has been shown." Smith v. Brough, 248 F.Supp. 435, 442 (D.C. Md. 1965), aff'd. 362 F.2d 763 (4th Cir. 1966).

Even when the constitutional claim raised in an individual case concerns the due process clause of the Fourteenth Amendment, the requirement of harm in the individual case has been maintained. See Fay v. New York, supra, at 287. (The court invoked the identity or prejudice requirement at the point in the opinion where the question of whether or not Fay had been denied due process of law was being considered; the conclusion had already been reached that the dual jury system in New York did not deny individuals equal protection of the laws.)

The fundamental right involved in this proceeding is Peters' right to a just and fair determination by an unbiased, unprejudiced and impartial grand jury. See Brown v. New Jersey, 175 U.S. 172, 175 (1899); Billingsley v. Clayton, 320 F.2d 13, 15, cert. den. 385 U.S. 841 (1966); Bailey v. Henslee, 287 F.2d 936, 941 (8th Cir. 1961). Without more, it is difficult to see how a white man such as Peters could have been denied an im-

partial judgment, per se, as a result of the exclusion of members not of his own race. In order to claim that this impartiality was somehow effected, identifiable prejudice should be shown, and is in fact required if a claim of constitutional dimensions is to be raised:

> "Bereft of the racial argument, the appellant has neither alleged nor shown any bias or prejudice in the grand jury which indicted him. He has thus failed to raise a question of constitutional dimensions." Salisbury v. Grimes, 406 F.2d 50, 51 (5th Cir. 1969).

Peters claims that his trial was essentially unfair, but he does not raise one fact which would indicate that the grand jurors who considered his guilt were somehow partial or biased. This he is required to do, not as a matter of speculation but as a matter of demonstrable reality. See United States ex rel. Darcy v. Handy, 351 U.S. 454, 462 (1955); Beck v. Washington, 359 U.S. 541, 558 (1962).

The requirement of prejudice, then, is an integral and necessary portion of Peters' case, if he is to

succeed. That he is white does not itself defeat his case, but he is required to make some showing that would indicate that the exclusion of blacks in his case adversely affected the impartial consideration of the grand jury. Without more, a white man is not denied equal protection of the laws by the exclusion alleged to exist in this particular case. Fleming v. Kelly, 438 F.2d 1147 (5th Cir. 1971), judgment reinstated, 438 F.2d 1147 (5th Cir. 1971); Salisbury v. Grimes, 406 F.2d 50, 51 (5th Cir. 1969); Mosely v. Smith, 404 F.2d 346, 347 (5th Cir. 1968); King v. Cook, 297 F.Supp. 99, 103 (N.D. Miss. 1969); Murphy v. Holman, 242 F.Supp. 480, 482 (M.D. Ala. 1965); Blauvelt v. Holman, 237 F.Supp. 385 (M.D. Ala. 1954); Woodruff v. Breazeale, 291 F.Supp. 130 (N.D. Miss. 1967), aff'd. 401 F.2d 997 (1968); see also Smith v. Brough, 248 F.Supp. 435, 440-2 (D. Md. 1965), aff'd. 362 F.2d 763 (1966); George v. United States, 196 F.2d 445, 452 (9th Cir. 1952); United States v. Valentine, 288 F.Supp. 957, 969-70 (D.P.R. 1968).

C. Decisions of this Court, construing federal statutes and their application to federal juries, do not dispense with the requirement of class membership or prejudice when constitutional questions are raised as to state proceedings.

Petitioner Peters asserts that cases decided by this Court have effectively rejected the rule that either class identity or, in its broader context, prejudice are required when a particular jury system is challenged on constitutional grounds. Ballard v. United States, 329 U.S. 187 (1946), Thiel v. Southern Pac. Co., 328 U.S. 217 (1945), and Glasser v. United States, 315 U.S. 60 (1941) do not have this effect. In the first place, each case was considered in Fay v. New York, 332 U.S. 261, 287-8 (1946), and the court there refused to accept the position being pressed by Peters here. The Fay court recognized the identity requirement, but, in the alternative, determined that the particular type of exclusions involved did not affect to any identifiable degree the impartiality of the jurors which tried the case. Fay v. New York, supra, at 287 and 292-3. This was required, for unlike the situation in Ballard, Thiel and Glasser, the court in Fay was considering questions of constitutional dimensions and not the application

and obligation imposed by Congressional statutes on federal criminal procedure. That some identifiable effect on the impartiality of jurors is required in order to raise a constitutional question is evidenced by the following:

> "No significant difference in viewpoint between those allegedly excluded and those permitted to serve has been proved and nothing in our experience permits us to assume it. It would require large assumptions to say that one's present economic status, in a society as fluid as ours, determines his outlook in the trial of cases in general or of this one in particular. * * * But we are not ready to assume that these differences of function degenerate into a hostility such that one cannot expect justice at the hands of occupations and groups other than his own." Fay v. New York, supra, at 292.

As for the class requirement or the requirement of prejudice when questions of constitutional dimensions are considered, Thiel v. Southern Pac. Co., supra, at 225, specifically infers that they are mandatory prerequisites in such cases:

> "The trial court should have granted petitioner's motion to strike the panel. That conclusion requires us to reverse the judgment below in the exercise of our power of supervision over the administration of justice in the Federal Courts. See McNabb v. United States, 318 US 332, 340, 87 L ed 819, 823, 63 S Ct 608. On that basis it becomes unnecessary to determine whether the petitioner was in any way prejudiced by the wrongful exclusion or whether he was one of the excluded class." [emphasis added]

While it is clear then that such legal challenges to the proper administration of statutes by government officials do not require identity or showing of prejudice, constitutional challenges do. See Salisbury v. Grimes, 406 F.2d 50, 51-2 (5th Cir. 1969); United States v. Valentine, 288 FSupp. 957, 969-70 (D.P.R. 1968)(stating that a litigant raising a constitutional challenge must establish his right to such has been prejudiced by the exclusion of which he complains, but a litigant invoking the supervisory jurisdiction must establish only a departure from the scheme of jury

selection, which Congress adopted.[2] Dean Rene Peters, not being a member of the excluded class, must make some showing which would enable a court to presume that race prejudice infected the minds of the grand jurors in his case. Without

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2/ Ga. Laws 1967, p. 251 [Ga. Code Ann. § 59-106 (1971 Supp.)] now requires that jury commissioners select a fairly representative cross-section of the intelligent and upright citizens of the county from the official registered voters' list which was used in the last preceding general election. There is no apparent reason why a timely challenge by any party litigant to the array of grand or traverse jurors on the basis that the commissioners had not fulfilled their legal duty under this section could not be made. See Simmons v. State, 226 Ga. 100, 112 (1970); cf. Reynolds v. Reynolds, 217 Ga. 234, 263 (1961); Griffin v. State, 183 Ga. 775, 777 (1937). When a constitutional challenge is made, however, the requirement of identity or prejudice is maintained. Cash v. Smith, 226 Ga. 318 (1970).

this, the alleged exclusionary practice would not deny him equal protection of the laws as guaranteed by the Fourteenth Amendment.

II.

THE ISSUE CONCERNING RETROACTIVITY IS NOT PROPERLY BEFORE THIS COURT FOR REVIEW.

As with the first question presented to this Court in Petitioner's brief, the second one raises some difficulty in relation to the proceedings below, the petition for certiorari, and case in general. First, there has never been any issue as to whether or not, if a court recognized correctness of the claim raised, Peters could receive the benefit of that decision in his case. The Respondent has never argued that even if Petitioner were correct, some rule of retroactivity would yet prevent his being granted relief. Also, the original petition for certiorari merely listed the question as to possible retroactive application of a rule this Court might establish in this case (Petition, p. 3), but the point was not argued or briefed in the application. Without the point being raised in the proceedings below and without the point being pursued in the petition for certiorari in this Court, it is simply not a proper question for consideration.

If Petitioner Peters seeks the benefit of a rule establishing the right of any person, regardless of his identity, to challenge his conviction on the basis that Negroes were intentionally excluded from the indicting grand jury, then it is quite unclear how a question of retroactivity concerns Peters, or what rule he believes should be "retrospectively" applied to his 1966 indictment. Reference is made in Petitioner's brief to Whitus v. Georgia, 385 U.S. 545 (1967), but the issue in that case has no bearing on the question now being considered.

On the other hand, if this case establishes a new rule, there would be little doubt that the benefit of the rule would be applied to Peters; if this were not so, there would be no case or controversy in the first place. A question of retrospective or prospective application of the "Peters rule", whatever it might be, is not appropriately pursued by him because the outcome would not affect him. It does not, at least, constitute one of the issues on the merits, as he has sought to make it.

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals for the Fifth Circuit should be affirmed.

Respectfully submitted,

ARTHUR K. BOLTON
Attorney General

HAROLD N. HILL, JR.
Executive Assistant
Attorney General

COURTNEY WILDER STANTON
Assistant Attorney General

DOROTHY T. BEASLEY
Assistant Attorney General

DAVID L. G. KING, JR.
Assistant Attorney General

ATTORNEYS FOR RESPONDENT

CERTIFICATE OF SERVICE

I, Dorothy T. Beasley, Attorney of Record for the Respondent herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that in accordance with the Rules of the Supreme Court of the United States, I served the foregoing Brief for Respondent on the Petitioner by depositing copies of the same in a United States mailbox, with first class postage prepaid, addressed to counsel of record at their post office addresses:

EDWARD T. M. GARLAND
Garland & Garland
229 Candler Building
Atlanta, Georgia 30303

JACK GREENBERG
JAMES M. NABRIT, III
CHARLES STEPHEN RALSTON
10 Columbus Circle
New York, New York 10019

This 11th day of February, 1972.

DOROTHY T. BEASLEY